APPENDIX.

EXHIBIT 1.

61ST CONGRESS,
2D SESSION.

H. R. 24070.

IN THE SENATE OF THE UNITED STATES.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the President be, and he hereby is, authorized to withdraw from location, settlement, filing, and entry areas of public lands in the United States, including the District of Alaska, for public uses or for examination and classification to determine their character and value; and the President is further authorized, when in his judgment public interest

requires it, to withdraw from location, settlement, filing, and entry areas of public lands in the United States, including the District of Alaska, whether classified or not, and submit to Congress recommendations as to legislation respecting the land so withdrawn.

2.

SEC. 2. That the Secretary of the Interior shall report all withdrawals made under the provisions of this Act to Congress at the beginning of its next regular session after date of the withdrawals, specifying the purposes of each thereof. All withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this Act. All withdrawals shall remain in force until revoked by the President or by Congress.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

(Endorsed:)
2D SESSION.
61ST CONGRESS.

H. R. 24070.

APPENDIX EXHIBIT 2.

Calendar No. 553.

61st Congress, 2d Session.

H. R. 24070.

In the Senate of the United States.
April 21, 1910.

Read twice and referred to the Committee on Public Lands.
April 23, 1910.

Reported by Mr. Smoot, with an Amendment.
May 26, 1910.

Ordered to be reprinted with new amendment in lieu of amendment previously reported.

(Strike out all after the enacting clause and insert the part printed in italics.)

AN ACT.

To authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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2

~~District of Alaska, whether classified or not, and submit to Congress recommendations as to legislation respecting the land so withdrawn.~~

~~SEC. 2. That the Secretary of the Interior shall report all withdrawals made under the provisions of this Act to Congress at the beginning of its next regular session after date of the withdrawals, specifying the purposes of each thereof. All withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this Act. All withdrawals shall remain in force until revoked by the President or by Congress.~~

That the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States and the Territory of Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided,* That the rights of any person who, at the date of any order of withdrawal

heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the

date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

4

SEC. 3. That the Secretary of the Interior shall report all such withdrawels to Congress at the beginning of its next regular session after the date of the withdrawals.

Passed the House of Representatives April 20, 1910.
Attest:

A. McDOWELL, *Clerk.*

16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913

No. 278

UNITED STATES, Appellant,

vs.

THE MIDWEST OIL COMPANY, ET AL., Appellees.

BRIEF FOR AMICUS CURIAE BY PERMISSION OF THE COURT.

FRANK H. SHORT

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Appellant,

vs.

MIDWEST OIL COMPANY, a Corporation, Appellee.

BRIEF SUBMITTED TO BE FILED AMICUS CURAIE

By FRANK H. SHORT

In view of the able and exhaustive briefs that have been filed and the able arguments that have already been made and those that are to be made in this case, counsel, appearing as a friend of the Court, would not presume to ask to be heard in any way or to any extent to cover the arguments or authorities in support of the doctrine that the withdrawal orders here under consideration are void. However, the professional duties and labors of counsel have in certain respects been along certain lines that are applicable to the questions before the Court, and for this reason it is felt that counsel may be of some assistance to the Court in pointing out, as briefly as can be done, a few and only a few of the fundamental considerations that it is felt should be applied to the decision of this case.

Counsel asking leave to file this brief represents a considerable number of oil locators, developers and operating companies that are and will be affected by the decision of the case, and therefore, and in view of these considerations and the reasons above stated, asks briefly to be heard.

It will be assumed that the authorities, pro and con, upon this question have been completely presented and completely argued, and in making these suggestions we will approach the subject with the view, and will undertake to sustain the same by argument, that upon fundamental considerations of the Constitution, based upon its express provisions and by the

literal terms of the withdrawal order under consideration, the order in question is clearly in excess of the powers of the President, and void.

For these reasons we shall not here pause to discuss the previous orders of withdrawal or the considerations upon which they were sustained or rejected, but shall submit that the withdrawal order under consideration is directly and frankly not in the exercise, or attempted exercise, of any of the powers, discretionary or otherwise, of the President, and which in certain cases have heretofore been held to justify the withdrawal by the President of certain public lands for public purposes. But the point will be made that this withdrawal is in no way analogous to any of said previous withdrawals, and is as stated, frankly and directly contrary to the laws of Congress and the powers of the President.

The substance of what is here said was contained in an argument delivered before the Honorable Maurice T. Dooling, District Judge for the Ninth Circuit, sitting in the Southern Division of California, and the suggestions there made are here repeated in somewhat abbreviated form, and as was then stated and as here repeated, were not made for the purpose of covering the arguments that might be made in the case, pro and con, but for the purpose of the definite statement of certain principles which we believe to be controlling.

In the course of this argument it will be assumed that there is no disagreement upon the proposition that the power of the President to withdraw lands, unless it be one of his inherent powers under the Constitution, must find support in and must not be in conflict with any act of Congress.

FIRST WE SUBMIT THAT THE PRESIDENT HAS NO INHERENT POWER WHATSOEVER UNDER THE CONSTITUTION PERTAINING TO THE PUBLIC LANDS

In this connection it can be necessary only to suggest to this learned tribunal certain elementary and well understood considerations which we would deem it unnecessary to mention at all except for the purpose of presenting their application in this connection.

It will be borne in mind that under the Federation, the general government, under the compact between the colonies, had not control over or interest in the public lands. That

these lands, in so far as they were then owned or controlled, were severally owned and controlled by the states or colonies. It will also be borne in mind that even during the formative period of the Constitution, it was for a considerable part of the period undecided as to whether these public lands should go to the federal government or should remain in the several states. It might well have been, and for a time it was thought that it would be decided that all of these lands should remain with the states, and in that event the public lands would not, nor would any of the questions appertaining thereto, have had any place in our scheme of government, nor any part in the interpretation of the Constitution or of federal laws. The states would simply have remained the sovereign proprietors of these lands, the federal government having no interest therein or control thereover.

During the period of the preparation and adoption of the Constitution, the question as to whether the public lands should remain in the states or should be transferred to the federal government was perhaps the most prominent single source of difference and difficulty. The great public land owning states, such as Virginia, very naturally and very firmly adhered to the idea that they should continue with the states. The non-owning states, such as Maryland, fearing the ascendency, superior power and wealth of the land owning states in the event they continued such ownership, with equal earnestness, insisted that they should be assigned to the federal government. And it appeared, for a time, that these deep-seated differences might have the effect to interfere with and prevent the successful formation of the American Union.

While this great controversy, for reasons later pointed out, has not been prominent in the history of this country, legally or otherwise, there was no other question more prominent in the making of the federal compact, and no other question came so near dividing the states and preventing the adoption of the Constitution.

The statesmanship and ability with which the subject was handled is illustrated by the fact that the State of Virginia, one of the greatest land owning states, was represented upon this question and in the negotiations which led to its settlement, by Thomas Jefferson, Samuel Hardy, Arthur Lee and James Monroe.

While then, as now, self interest was a powerful argument, it did not prevail, and the conferences and negotiations were finally concluded by the several land owning states ceding to the federal government their publicly owned lands. This was done pursuant to the well-defined public policy covered by public documents and congressional enactments in substance to this effect, that the federal government should become the proprietor of the public lands in trust for the several states and for the people. That these lands should be disposed of at nominal prices in aid of the settlement of the Revolutionary war debt, and to meet the urgent necessities of the federal government. And that as soon as might be done, all of these lands should be passed to actual settlement and that over these lands there should be erected new states, equal in all respects whatsoever to the original states of the Union.

History does not disclose that any governmental question was ever broached with greater seriousness, discussed with greater ability, or settled with greater patriotism, than this great question.

In contemplation of this, it is a matter of consolation and pride to observe that for at least one hundred years after the adoption of the Constitution, the federal government was so faithful to this trust, so swift and zealous in carrying it out in letter and in spirit, that there arose few and unimportant controversies concerning this trusteeship, and after certain questions of governmental and state sovereignty had been settled, the federal government proceeded with such expedition and liberality to carry out the compact and policy under which it received the public lands that the importance of the controversy, the statesmanship involved in its settlement, and its difficulties and advantages, were largely buried and forgotten in the archives of the government.

The public lands of all of the states were conveyed to the federal government, and the sole fundamental provision with respect thereto is embodied in the following paragraph of Article IV of the Constitution, under the heading, "THE STATES AND THE FEDERAL GOVERNMENT:"

> "CONTROL OF PROPERTY AND TERRITORY OF THE UNION.
>
> 2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so

construed as to prejudice any claims of the United States, or of any particular State."

The word "territory" has always been construed as referring to the public lands.

It is here of interest and importance to note that while by the Constitution the subject of the control and disposition of the public lands could have been committed to the federal government as such, or could have been committed solely to the Executive Department of the government, it was committed solely to the Congress. While in all of the general scope and functions of the government under the Constitution, the Executive has and exercises inherent or implied constitutional power, with respect to the public lands, it cannot be claimed that he has any constitutional or inherent powers whatsoever.

The power of control and disposition over the public lands was doubtless conferred in its solidarity upon Congress for the reason that each of the states was there represented and could there be heard, whether it should be in the Senate as states or in the House of Representatives, speaking for the people of the several states.

Therefore, in their wisdom, the makers of the Constitution did not commit this trust to the President or to the Executive branch of the government, but solely and only to the Congress representing all of the states and all of the people, where, it was rightly inferred no sectional, exceptional or local views would be predominant.

It is well to observe in passing that even the Congress, in handling and disposing of the public lands, were not to do so under general laws passed as such, but were to "make all needful rules and regulations representing the territory or other property belonging to the United States."

We may further assume that it could not reasonably be doubted that the Congress might, by these rules and regulations, have provided for its own Administrative Department, under these rules, to have charge of and attend to the management and disposition of these lands. Had Congress chosen to pursue this policy, the question of the right of the President to exercise any authority in this connection at all could have arisen only upon the contention that such rules and regulations were equivalent to laws, and that the provisions under the powers of the President that "He shall take care that

the laws be faithfully executed, etc.," would have included these rules and regulations. We think it may be assumed without much doubt that in the event of such procedure and action on the part of Congress that this implied power would not even have been claimed, much less could it have been supported.

However, we do not deem this theoretical question of any importance requiring discussion, since under either or any view it is clear beyond argument that all of the constitutional power was vested in Congress, and under any view or construction the President or Executive Department could exercise no powers over or pertaining to the public lands except under a law or a rule or a regulation of Congress. In the absence of any such law, rule or regulation, it could not be claimed that the President or the Executive Department would or could exercise any constitutional or implied powers, or have any control or authority over the public lands whatsoever. And this being the inevitable conclusion, we need not digress to discuss a subject that cannot here arise.

However, in its wisdom, the Congress, to the end that there might be an undivided authority and solidarity in connection with the administration of all the laws, rules and regulations of Congress, has, with practical uniformity, committed the administration of its laws, rules and regulations concerning the public lands to the President or to the Executive branch of the government so that they have been administered as other laws have been administered and enforced. Not, however, it will be observed, under the silent, implied authority of the Constitution, but under constantly repeated acts and provisions carried into the laws, rules and regulations of Congress.

In concluding this suggestion we may, therefore, submit that the only powers which the President or the Executive Department of the government may exercise must of necessity be derived through and under and by virtue of some rule, regulation or act of Congress, and that in the absence of any rule, regulation or act of Congress, and to be enforced or carried into effect, neither the President or any part of the Executive branch of the government have any powers over or in connection with the public lands, express, implied, or otherwise.

The United States is the proprietor of the public lands. It

has, as a government, of its own initiative, the power to protect its property, to prevent unlawful invasions or trespasses upon the same, and especially in connection with the public land laws it has always been the reiterated policy of Congress to confer expressly upon the President or the Executive branch of the government the power and duty to protect the public lands from trespass, or invasion, or fraudulent acquisition, and by suitable acts of Congress these matters of right have been appropriately covered and provided for and the powers of the Executive and the duties of that Department have been made sufficiently clear and well understood.

It would not, therefore, appear to us that the decisions cited and which hold that the President or his subordinate officers in the Executive Department of the government had the power and the duty, under the laws of Congress, to protect all such proprietary rights, to bring or cause to be brought all proper criminal and civil actions and enforce these proprietary rights and the laws, rules and regulations of Congress would have even colorable significance in this controversy, because we are here not only not considering the enforcement of any proprietary right or any law, rule or regulation of Congress, but we are actually considering and considering only the question of the suspension of a law of Congress by the President.

It would be a far cry, we may here suggest, between such decisions and such construction, and a decision and a construction that not only without a law, rule or regulation of Congress, but in suspension of such law, the President would have the power to act, and his action in that regard would be upheld. If the situation, under the circumstances, is the precise legal antithesis of the other, we would not be able to understand how any relation or similarity could be suggested; but the antithesis seems to us to be perfect.

In the right of these fundamental and undeniable considerations, we wish to proceed to consider precisely what the withdrawal order of the President under consideration is; to what it is directed; and what is its effect, and to submit

THAT THE WITHDRAWAL ORDER OF THE PRESIDENT HERE UNDER CONSIDERATION HAS NO POSSIBLE RELATION TO ANY CONSTITUTIONAL POWER OF THE PRESIDENT, AND IS NOT ONLY NOT CLAIMED TO BE SUPPORTED BY ANY ACT OF CONGRESS, BUT IS FRANKLY IN SUSPENSION OF SUCH ACT.

The particular act of Congress here under consideration would seem to be about as explicit and mandatory as a law could well be made. Section 2319 of the Revised Statutes reads as follows:

> "MINERAL LANDS OPEN TO PURCHASE BY CITIZENS.
>
> All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Under this act, the declaration of Congress, until title passes from the United States, is continuous and comprehensive. The declaration is that they shall "be free and open to exploration and purchase, etc."

It is not questioned that under the act of February 11, 1897, (Revised Statutes, Vol. 2, page 1434), the lands in question are in the same category as other mineral lands and are subject to similar exploration, discovery, entry and purchase.

By some inexplicable confusion of thought, those who have attempted to sustain the withdrawal order of President Taft have endeavored, perhaps by force of necessity, to assume that these lands in being withdrawn, instead of the operation of the law being suspended, were withdrawn for some use or purpose of the Government. The order itself is definitely to the contrary. It may be here parenthetically observed that the President who made this withdrawal order was himself a very distinguished lawyer, of great learning in the law, and incapable of dissembling. That he publicly state in a way that it has become practically a matter of history that he made this order in deference to certain urgent public demands and with doubts and reservations in his own mind as to whether it was within his power or not, but thinking that probably the public interests were such that he should give the situa-

tion the benefit of the doubt, he made the withdrawal order; but never did he aver that in his own opinion the order was valid, but merely in substance to the effect that he felt that the public demand and urgency was such that he was justified in making the order, although in doubt as to its validity, leaving that question to later determination.

In face of the form and language of the withdrawal order, it should not be necessary to make an argument of any length to dissipate a contention that the withdrawal was made for any use or purpose of the government of the United States. There need be no question raised here but what where the public lands are placed on sale, or subject to entry and disposition by citizens, the government may exercise, nevertheless, its proprietary right to select, acquire or withhold certain of these lands for its own authorized, governmental uses, or purposes, but that nothing of the kind is here pretended, appears upon the face of the withdrawal order under consideration itself.

The material portions of the withdrawal order under consideration read as follows:

> "In aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain, all lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral land laws. Etc."

It has been urged in nisi prius courts that the President had in his mind some unexpressed idea or intention that the 4,500,000 acres of land withdrawn under this order, whether known to contain mineral oils or not, should be withdrawn for the use of the Navy. Our esteemed adversaries do not seem to appreciate that they are seeking to give to this executive order the force of law, and that a law always goes into effect either by force of its own language, or not at all. It is never to be aided, added to or subtracted from by evidence. If the President had any purpose or intention of the kind, he not only did not express it, but certainly must be understood to have said that he had no use or purpose in his own mind at all. Whatever use or purpose was in mind was in the mind of the Congress, and when the President referred to future

legislation, he did not refer to future legislation by the President or to anything that was in his own mind, but to future legislation by Congress, and something that may have inferentially and by psychological process have existed in the mind of Congress, but not in the mind of the author of this withdrawal order.

The whole scope and purpose of the order is expressed by the language, "In aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain."

By the existing acts of Congress these lands were expressly subject to exploration, discovery, entry and purchase and unless this order suspended this law, they so remained. This order did not affect any special or particular piece of land in any special or particular locality. It affected certain character of lands of vast extent and widely scattered through the country. The President of the United States did not say or intimate that these lands were needed or withdrawn or selected for any use or purpose by the government of the United States, but clearly expressed the idea that they were to be disposed of. If we should even endeavor to indulge in the inference that some of them were to be used, others to be disposed of, and that order was recognized, not as a subject of executive action, but of legislative action.

Therefore, we have no case or question of the power of the Executive under existing laws to take over certain property for and on behalf of the United States. But we have a clear and unequivocal question of the power of the Executive of the United States to say that an existing law of Congress is suspended and shall remain suspended until the Congress shall pass a different law for the use and disposition of something which is already, under an existing law of Congress, subject to use and disposition.

It is not a matter of use or appropriation; nothing of the kind is claimed or pretended. It is not even a matter of an endeavor on the part of the Executive to withhold lands for the temporary or permanent purposes of the government; but it is a clear and unequivocal statement of a suspension of a law until there is different legislation.

If we are not mistaken as to the fundamental and constitutional considerations here involved, and if we are not mistaken in what appears to be the unequivocal language of Con-

gress, and if we are not mistaken as to what appears to be the clear and unequivocal language of the Executive, by virtue of such constitutional principle, by virtue of the clear and unequivocal language of Congress, by virtue of the clear and unequivocal language of the Executive, this order fails of its own expression and its own weight, unless the President may suspend the operation of a law of Congress.

It is not, we repeat, a question of the withdrawal of lands, but of the suspension of the law.

The President did not say, or attempt to say, "The United States needs or desires these lands for forts, or arsenals, or military reserves, or national parks, or forest reservations, or Indian reservations, or national cemeteries, or any other conceivable purpose of the government, present or prospective. He did not pretend anything of the kind. He frankly said that whether the government might use some of these lands or not, or whether it might permit or authorize others to do so without disposing of them (the latter being the natural inference), that the Executive did not have in mind any withdrawal of these lands for governmental purposes; but he frankly and undeniably stated that they were withdrawn, not for any such purpose, but "in aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain." If this does not confute and defeat the contentions of those who seek to uphold the order of the President upon the theory of selection or appropriation for some governmental purpose, we are unable to appreciate the scope or use of language.

The language of the withdrawal order, we think, is sufficiently frank and expressive, and is conclusive of the question. The necessary rule is, however, to look rather to the legal effect of the words used than to their mere form. The whole substance and effect of this order is undeniably this; until the Congress, as the legislative branch of the government, shall enact different laws, the lands described in the accompanying lists are withdrawn from the effect of and from exploration, location, entry and all forms of disposition under existing laws. Or, the effect of the order would have been identically the same if the following words had been used:

"All lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral laws

of the United States, until the Congress shall pass laws different from those that are now in force and effect."

In the effort to sustain this order it has been suggested, as above indicated, that the President was withdrawing them for the products thereof—the petroleum presumed to be contained therein.

While, of course, if lands were withdrawn for military purposes, one of these purposes or the use might be the pasturage of horses, and we may assume that an adjacent field might be reserved for the raising of hay or other feed for immediate use. It is, however, a very different and a picturesque idea to suggest that these millions of acres of lands were withdrawn from their possible productiveness, not for use of the lands, but for use of the product. If this theory could be sustained without any declaration of congressional policy or act, there would be no lands that the President could not withdraw in entire suspension of any act of Congress. It can hardly be conceived that any lands exist that would not raise corn for horses, or barley or oats for feed, or that would not produce pasturage for cattle upon which to raise beef to feed the Army and the Navy, or that would not produce timber to build ships and forts, or materials with which to construct public improvements, or lead for bullets, or stone or copper for forts, or gold or silver for money, or oil or coal for fuel.

If the present or future possible necessities of the government in the way of a product for some probable or possible use could be used as a subterfuge as the basis of a withdrawal order (using the word "subterfuge" in its legal sense), there does not now exist, and there never did exist, any acre of the public land that could not by the Executive without congressional consent have been withdrawn from the operation of a law of Congress.

The government assumes that President Taft was withdrawing these lands for the supposed use of the Navy—4,500,000 acres—and by the process of psychology concludes that this was the use and purpose that lay in his mind—no other inference that we have heard of has been suggested—other than to keep them from being taken up by citizens under existing laws. If the law is to be considered and discussed by the processes of psychology and mind-reading, it should be kept in mind that President Taft's most cherished policy and his best beloved scheme was the promulgation of peace

throughout the earth; he had actually negotiated far-reaching and important treaties for the submission of all disputes between nations to arbitration—nevertheless, our friends on the other side ask us, in order to sustain this unprecedented withdrawal order, to assume that the greatest proponent of peace of this generation was assuming and preparing for war so prolonged that necessary oil for the Navy would consume the products of 4,500,000 acres. Assume extravagantly that in actual war the Navy could exhaust the product of as much as 1,000 acres of oil territory per annum, we would have sufficient oil to carry on war for 4,500 years preserved and stored in the earth, at the behest of the greatest advocate of peace of our generation. All of this, however, is mere digression, and, we confess, a somewhat fanciful reply to what appears to us to be a very fanciful argument.

In conclusion, this Court is to decide, as it appears to us, one fundamental question in this case; we have, at last, a case where there is no effort to withdraw or apply the lands to any existing present or future use, stated, understood or implied by the Executive. There is not even any stated, understood or implied use of the government of any character, present or future. But this 4,500,000 acres of public domain, all confessedly subject to be acquired by citizens under a law of Congress. The President, by executive assertion of his authority, declares nothing more nor less than that a law of Congress shall remain suspended; that these lands shall remain undisposed of; shall be withdrawn "in aid of future legislation," as the President himself puts it. In other words, in bald suspension of existing law until the Legislative branch of the government shall pass different laws more in accord, we may assume, with Executive ideas.

If the President has this power, it would be interesting to consider whether or not it may be taken away from him by Congress. If he has the power, and if it cannot be taken away, then until Congress passes laws pleasing to the Executive it is entirely within the power of the Executive to say that no more of the public lands shall be disposed of, notwithstanding a law of Congress, until the law passed by Congress meets the critical inspection and approval of the Executive. Or, even if Congress could by express enactment prevent the suspension of these laws and leave the public lands open to settlement beyond the withdrawal of the President, never-

theless, as to all existing laws and as to all future laws and all of the public lands, unless the Congress specifically prohibited the suspension of these laws by the President, the lands could be effectually withdrawn and the laws of Congress for the disposition thereof could be effectually suspended.

It is not possible, we think, to conceive of a law that more frankly or directly undertakes to suspend a law of Congress, and in the interval to deny to all citizens their rights as such under the law of Congress, than this withdrawal. Therefore, this is not a case, as all previous cases have been, of refined consideration as to whether the withdrawal falls in one class or another. This order of withdrawal, read and understood in accordance with its own expressed language, is not a withdrawal for any occupation or purpose or use of the government, but it is a withdrawal "in aid of future legislation"—in suspension of present laws, and if we understand the Constitution of our country and its laws, and the decisions of this Court, there is nothing better settled than that the Executive Department of this government, except that it is expressly authorized by the Legislative branch of the government, cannot interfere with or suspend the operation of a law. The plain, constitutional duty and function of the Executive branch of the government is, and the performance of this duty can be compelled by mandamus, to execute and enforce the laws, not nullify and suspend the laws.

Respectfully submitted,

FRANK H. SHORT,
Amicus Curaie.

On behalf of the Honolulu Consolidated Oil Company, a corporation, and many other oil locators, operators and claimants of property affected by the decision in this action.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. [redacted] 278

UNITED STATES, APPELLANT,

vs.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF AMICI CURIAE BY LEAVE OF COURT.

ALDIS B. BROWNE.
ALEXANDER BRITTON.
EVANS BROWNE.
FRANCIS W. CLEMENTS.
FREDERIC R. KELLOGG.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 750.

UNITED STATES, APPELLANT,

vs.

THE MIDWEST OIL COMPANY ET AL., APPELLEES.

BRIEF AMICI CURIAE BY LEAVE OF COURT.

We have asked leave to file this brief in behalf of the Midland Oilfields Company, Limited, and the American Oilfields Company, Limited, whose interests may be materially affected by the opinion rendered.

We contend:

1. That congressional authority, or at least congressional acquiescence, must be found to support any Executive withdrawal or withholding of public lands from disposal in the manner provided therefor by the Congress, and

2. That congressional authority or acquiescence cannot be found to support the order of September 27, 1909, here in question.

I.

Congressional authority, or at least congressional acquiescence, must be found to support any Executive withdrawal or withholding of public lands from disposal in the manner provided therefor by the Congress.

Under the Constitution the power "to dispose of and make all needful rules and regulations" respecting the public domain is vested in the Congress. Article IV, section 3, U. S. Constitution.

In the exercise of its power Congress has established a Land Department, but the duties of its officers are prescribed by law, and they have no power except as conferred. From time to time Congress has enacted general laws prescribing the method of acquiring title to the public lands. It has limited certain class of disposals to agricultural lands; it has excepted from certain forms of disposal saline and mineral lands. In no one of these laws is its operation confined to such lands as, in the judgment of the Executive, may be permitted to remain subject thereto.

It is not our purpose to enter into an extended argument respecting the powers of the President. He is commanded to "faithfully execute" the law. In common with every other officer of the United States he is a creature of the law, subordinate and not superior thereto. His power of withdrawal of public lands from the disposition provided therefor by the Congress must find justification in the law. The withdrawal of lands which are at the time subject to disposal under an act of Congress can mean nothing more nor less than the suspension of the law. Indeed withdrawal amounts to an appropriation of the lands withdrawn and no appropriation of the public lands can be made for any purpose except by authority of Congress. *United States vs. Tichenor*, 12 Fed. Rep., 422-423.

It is admitted that no general power of withdrawal of the public lands has been directly conferred upon the executive

branch of the Government. It is suggested, however, that an inherent power is vested in the President respecting the public lands in the exercise of which he is empowered to withdraw public lands from general disposition when, in his opinion, it would be for the public good. If this inherent power permits the withdrawal of lands from the specific form of disposition provided by Congress may it not permit disposition of a tract specifically withheld by the Congress?

In *Burfenning vs. Railroad Company*, 163 U. S., 319, it was specifically ruled that the executive officers cannot override the expressed will of Congress respecting the public lands. THE WILL OF CONGRESS IS FULLY EXPRESSED WHEN IT HAS PROVIDED THAT A PARTICULAR CLASS OF LANDS MAY BE DISPOSED OF IN A GIVEN MANNER.

In the Matter of the Fort Boise Reservation the then Secretary, later Justice Lamar, had under consideration the question as to the effect which should be given to a reservation by the War Department of lands in excess of the quantity authorized to be withdrawn by the act of February 14, 1853, and with respect thereto he said (*Fort Boise Hay Reservation*, 6 L. D., 16, 19):

> "Will such an act take the lands out of the class of public lands and require their disposal by special enactment? To so hold would indicate that the Executive might, in violation of law, put in reserve for military purposes any amount of lands, and thus take them out of the operation of the general law. To assert such a privilege is to claim for the Executive power to repeal or alter the acts of Congress at will."

The situation there under consideration, like that in the Burfenning case, involved an express congressional limitation, but the difference between overriding a congressional enactment that no more than a given quantity of land shall be reserved for a specifically authorized public use and rendering nugatory the public laws permitting the acquisition of lands by citizens in the manner prescribed by the Congress is but one of degree.

All of the cases relied upon by the appellant in support of the authority claimed to be vested in the Executive will, we submit, be found on examination to rest upon authority previously conferred by Congress or in later legislation in acquiescence of the authority previously exercised. These cases are fully considered in the briefs heretofore filed in this case, and only a passing reference will be made in illustration.

Thus, for example, in *Grisar vs. McDowell*, 6 Wall., 363, the court's dictum as to the executive power to reserve lands is, in part, supported by the statement that "the action of the President in making the reservation in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them."

So Attorney General MacVeagh, in the language quoted by appellant from his opinion (17 Op., 160), said: "Hence in reserving and setting apart a particular piece of land for a special public use the President must be regarded as acting by authority of Congress." So, too, the opinions of Assistant Attorney General Van Devanter (29 L. D., 32), of Attorney General Miller (19 Op., 371), and of Attorney General Brewster (17 Op., 258), as shown by the language quoted by appellant, are based on the same theory.

Recognition of inherent power in the Executive, which may be exercised in opposition to the expressed will of Congress, is a dangerous precedent and strikes directly at the foundation of our form of government.

This court has repeatedly held that there is no place in our constitutional system for the exercise of arbitrary power, and when the officers of the Land Department have exceeded the authority conferred by law this court has preserved the status of parties aggrieved by such unwarranted action.

THE RECOGNITION OF INHERENT POWER IN THE EXECUTIVE IS BUT THE GRANT OF ARBITRARY POWER.

For the views of the Executive branch of the Government at the time the withdrawal in question was made, respecting its power to withhold public lands from general disposition, it was said in the annual report of the Secretary of the Interior for the year 1908, at page 10:

> "The public domain has been placed by Congress under the Interior Department, and ample authority is vested in the Chief Executive and the Secretary of the Department to take such action as is necessary to care for the public domain. During many years the Executive has in the exercise of this general authority withdrawn at different times and for various purposes areas of the public domain and for the time being prevented those areas from being entered for private use.
>
> "FULL POWER UNDER THE CONSTITUTION WAS VESTED IN THE EXECUTIVE BRANCH OF THE GOVERNMENT, AND THE EXTENT TO WHICH THAT POWER MAY BE EXERCISED IS GOVERNED WHOLLY BY THE DISCRETION OF THE EXECUTIVE, UNLESS ANY SPECIFIC ACT HAS BEEN PROHIBITED EITHER BY THE CONSTITUTION OR BY LEGISLATION.
>
> "In the exercise of this power it is the duty of the Executive to take such action as will protect the interests of all the people of the United States in their property rights, and, if the occasion requires and the facts warrant, it is the duty of the Executive to prevent the acquisition of the public domain by private interests if such acquisition be detrimental to the public welfare."

II.

Congressional Authority or Acquiescence Cannot Be Found to Support the Order of September 27, 1909, Here in Question.

The only legislation occurring since the withdrawal here in question is the law of June 25, 1910, commonly known as the Pickett act (36 Stats. L., 847).

Now the point here is that the congressional sanction, expressed or implied, without which there is no semblance of support to appellant's argument, was by the legislation referred to denied.

Let us first look to the nature and extent of the withdrawals which were made by the Executive just prior to the passage of the act of June 25, 1910.

About the year 1906 the practice was inaugurated of withdrawing from disposition, under laws applicable thereto, large areas of public lands, because the same were believed to be valuable for development of water power, *a factor never before referred to in legislation affecting disposal of the public lands.* Serious doubt was entertained by the officials as to their authority for making such withdrawals. This is clearly indicated by the methods resorted to. In the Executive orders the real purpose was not recited, the withdrawals being under the guise of so-called "administrative sites" for the use of the Forest Service, or under withdrawals made under the reclamation act, on the pretext that the lands were desired for use in connection with reclamation projects. Later, under alleged "supervisory authority," as defined in the report of the Secretary of the Interior for the year 1908, hereinbefore quoted, large tracts of supposed coal lands were withdrawn from disposition for the purpose of classification or the fixing of a price different from that named in the statute, and then follows the withdrawals, including the one here in question, when large areas of public lands supposed

to have value because of deposits of phosphates or oil, were withdrawn from sale, entry or location under public-land laws *in aid of proposed legislation*.

The specific order here in question withdrew 3,041,000 acres, and in referring thereto the Director of the Geological Survey, on whose recommendation all the withdrawals were made, says:

> "In consequence Secretary of the Interior Ballinger on September 27, 1909, withdrew from all forms of entry, location or disposition, *all public lands believed to contain valuable deposits of oil or gas*. As information has since been obtained indicating other public lands to be valuable for these minerals they have also been withdrawn from all form of disposition under mineral or non-mineral land laws." (See Bulletin 537, p. 38.)

This is a true statement, and when considered in connection with the statement of Senator Borah hereinafter referred to, wherein he states that 127,658 acres have been withdrawn in the State of Idaho alone for power purposes, gives some idea as to the effect of a decision giving judicial recognition to the claimed inherent right in the Executive to suspend the laws of Congress. Surely such an appropriation of power to the Executive should not be recognized.

A claim for recognition of a limited withdrawal to meet an immediate exigency might appeal to the court, but the facts respecting these wholesale withdrawals show that the pretended exigency sought to be found in the future needs of the navy is evidently advanced to meet the exigencies of the case. Clearly the large withdrawals of phosphate lands and those supposed to be valuable for power purposes cannot be rested upon the supposed needs of either the army or navy, and they but shed light upon the specific withdrawal here in question.

If we look now to the Pickett bill, which became the act of June 25, 1910, we find that, as originally referred to the House, it embraced two important propositions:

(1) Conferring upon the President authority to make withdrawals of public land for purposes named, and (2) ratifying the withdrawals theretofore made. It was stated by Mr. Pickett in support of the bill (Cong. Rec., 61 Cong., 2d sess., 45, pt. 5, p. 5089):

> "During the administration of President Roosevelt large areas of the public domain containing valuable coal deposits, oil, water-power sites, and so forth, were, by Executive order, withdrawn from location, sale and entry for the purpose of conserving the interests of the people therein, and this policy has been continued by the present administration. The authority for such Executive action has been questioned. In many cases attempts have been made to appropriate land so withdrawn on the theory that the withdrawals were unauthorized. I shall not attempt at this time to discuss the legal question involved. It is sufficient for the purpose of this measure to say that the authority of the President to make withdrawals as contemplated in this bill is subject to doubt. It would therefore seem important to remove any doubt or uncertainty in the matter by express statutory authorization. On this subject the President of the United States, in his special message to Congress, January 14, 1910, says:
>
> " 'The power of the Secretary of the Interior to withdraw from the operation of existing statutes tracts of land the disposition of which under such statutes, would be detrimental to the public interests is not clear or satisfactory. This power has been exercised in the interests of the public with the hope that Congress might affirm the action of the Executive by laws adapted to the new conditions. Undoubtedly Congress has not thus far fully acted on the recommendation of the Executive and the question as to what the Executive is to do under the circumstances is full of difficulty. It seems to me that it is the duty of Congress now, by a statute, to validate the withdrawals which have been made by the Secretary of the Interior and the President and to authorize the Secretary of the Interior temporarily to withdraw lands, pending submission to Congress of recommendations

as to legislation to meet conditions or emergencies as they arise.'

"There is another reason for the legislation at this time. The policy as to the disposition and use of the public resources has not crystallized, and until a method can be agreed upon in respect thereto proper authority should be lodged somewhere to preserve the *status quo*. On the proposition to confer this authority on the President there is, as I have before stated, practically no division of opinion among the members of the committee.

"The first issue that arises is over the clause in the committee bill ratifying and confirming prior withdrawals."

Whatever may be claimed as to previous Executive reservations the action upon this bill shows that the consent of Congress to the withdrawals, including that here in question, was expressly withheld. An implied authority cannot, it is submitted, be deduced where express consent is refused, and this we think is the clear import of the action taken by the Congress upon the Pickett bill.

This bill as it was first passed by the House contained a provision ratifying "all withdrawals heretofore made." (See Appendix, Exhibit 1.) This provision was directly responsive to the message of the President, who urged upon Congress the approval of his previous orders. But the Senate Committee in charge of the bill struck out the clause (Appendix, Exhibit 2).

The President's doubts as to the validity of the previous orders of withdrawal were fully shared both by members of the House and the Senate, and the Senate amendments, including that which struck from the House bill the confirmation of previous orders, clearly negative congressional acquiescence in these prior orders of withdrawal. In fact it seems that the passage of the pending bill was largely aided by the fear that its failure of passage might be construed into a legislative recognition of the power then being exercised by the Executive.

Thus Senator Borah, in the debate on June 7, 1910, when the Senate amendments were under discussion, said (Cong. Rec., 6st Cong., 2d sess., v. 45, pt. 7, p. 7543):

> "I wish to ask the Senator a question. One of my reasons for being inclined to support the bill is the fact that it may have a limiting effect upon the power which has been heretofore and is now being exercised. The power is now being exercised, and in my judgment, in violation of law; but nevertheless it is being exercised. * * *
>
> "I agree perfectly with the Senator from Wyoming in his legal proposition that these withdrawals have been without authority of law; that they were in violation of law; but they have taken place. The result has been the same to the settler. The result has been the same upon the country. We will force that precedent in my judgment, if we do not undertake to restrain such action within some statutory power.
>
> "The question I desire to submit to the Senator is whether we had not better frame some withdrawal statute than to force upon the President the necessity of apparently acting without authority, because that is what we are doing, and it is what it seems they are going to continue to do. There are 127,658 acres of land withdrawn in the State of Idaho for power sites under an authority which does not exist; but it has the same effect upon the State as if it did exist—127,000 acres, more power sites than we will use in the next five thousand years in the State of Idaho."

As before stated, it is conceded that there is no statute conferring upon the Executive the general power to reserve from disposition public lands, and the only general act on this subject is the act of June 25, 1910.

The power given the President by that statute is to reserve lands "for water-power sites, irrigation, classification of lands or public purposes to be specified in the order of withdrawals." *Expressio unius est exclusio alterius.* Bearing in mind that the order of September 27, 1909, was constantly before Congress in the enactment of the statute of June 25,

1910, there we find a studious avoidance in that act of any authority for, or approval of, a withdrawal *"in aid of proposed legislation."*

Still bearing in mind that the President's message requested ratification and approval of the executive withdrawal of September 27, 1909, and that that withdrawal specified no public purpose, it is of marked importance that the act of June 25, 1910, requires that the exercise of the President's power to withdraw must be accompanied by *a specification of the purpose in the order of withdrawal.*

Again the act of June 25, 1910, expressly provides that all lands withdrawn by the President shall be open to exploration, discovery, occupation and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals (act of June 25, 1910, amended by act of August 24, 1912). The order of September 27, 1909, on the contrary, withdrew the lands from all forms of location, entry or disposal under the mineral laws.

The withdrawal order reserved the land from all forms of settlement, selection, filing, entry or disposal under the mineral or non-mineral public-land laws The act of June 25, 1910, on the contrary, provides that there shall be excepted from the force and effect of any withdrawal made under the provisions of that act, lands which at the date of such withdrawal are "embraced in any lawful homestead or desert entry theretofore made or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law." According to the terms of the withdrawal of September 27, 1909, no lawful homestead or desert entry or valid settlement could be made, or, if made, perfected, on any of the lands described in the order. Under the act of June 25, 1910, all such homestead or desert entries or other valid settlements could, on the contrary, be made up to the time of a withdrawal made pursuant to the statute.

The order of withdrawal provides that all locations or claims existing and valid at the date thereof may proceed to

entry, and, by implication, purports to cut off the right of purchase under the mining laws, of an *occupant* whose possession had not ripened into a location or claim. The act of June 25, 1910, on the contrary, expressly provides that the rights of a *bona fide* occupant or claimant of oil or gas bearing lands, complying with the provisions of the statute, shall not be affected or impaired by a subsequent order of withdrawal.

In all these respects the provisions of the order of September 27, 1909, not only failed to receive congressional recognition, but are directly contrary to the expressed will of Congress. Measured by this statute, how can the withdrawal here in question be upheld?

Again, section 2320, R. S., provides:

> "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Clearly, therefore, no right of purchase is acquired, nor is any claim in fact initiated under the mining laws as against the United States prior to actual discovery of a valuable mineral deposit within the limits of the claim located. However, by section 2 of the said act of June 25, 1910, it was provided that one in the *bona fide* occupation of oil or gas bearing land without *previous discovery* but in diligent prosecution of work thereon at date of withdrawal "shall not be affected or impaired by such order" so long as he shall diligently prosecute the work towards actual discovery, and this protection or grant of right was specifically made applicable to the lands attempted to be previously withdrawn by Executive order. Congress therefore not only withheld its assent to or acquiescence in the previous executive withdrawal of mineral lands, all of which claims would have been terminated had such assent been given, but, on the contrary, conferred rights upon these inchoate claims, even as against a possible recognition of such withdrawal by the courts.

Finally, this act also expressly provides that it shall not be construed as a recognition, abridgment or acknowledgment of any "asserted rights" or "claims" upon oil or gas bearing lands after a withdrawal made *prior* to the passage of the act, though such asserted rights or claims would obviously be in derogation of the prior executive withdrawal. Ratification withheld is, we submit, as effective here as though consent had been expressly refused.

Thus there is no congressional assent, express or implied, to be found to support the executive withdrawal of September 27, 1909. Congressional assent to or acquiescence in that withdrawal was purposely withheld in the passage of the act of June 25, 1910, the express provisions of which are not only repugnant to the terms of the order for such withdrawal, but to the purpose and effect thereof surely as applied to the rights of mineral claimants.

ALDIS B. BROWNE.
ALEXANDER BRITTON.
EVANS BROWNE.
FRANCIS W. CLEMENTS.
FREDERIC R. KELLOGG.

APPENDIX.

EXHIBIT 1.

61ST CONGRESS, 2D SESSION. H. R. 24070.

IN THE SENATE OF THE UNITED STATES.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he hereby is, authorized to withdraw from location, settlement, filing, and entry areas of public lands in the United States, including the District of Alaska, for public uses or for examination and classification to determine their character and value; and the President is further authorized, when in his judgment public interest

requires it, to withdraw from location, settlement, filing, and entry areas of public lands in the United States, including the District of Alaska, whether classified or not, and submit to Congress recommendations as to legislation respecting the land so withdrawn.

2

SEC. 2. That the Secretary of the Interior shall report all withdrawals made under the provisions of this Act to Congress at the beginning of its next regular session after date of withdrawals, specifying the purposes of each thereof. All withdrawals heretofore made and now existing are hereby ratified and confirmed as if originally made under this Act. All withdrawals shall remain in force until revoked by the President or by Congress.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

(Endorsed:)

2D SESSION, 61ST CONGRESS. } H. R. 24070.

APPENDIX EXHIBIT 2.

Calendar No. 553.

61st Congress, 2d Session.

H. R. 24070.

In the Senate of the United States.

April 21, 1910.

Read twice and referred to the Committee on Public Lands.

April 23, 1910.

Reported by Mr. Smoot, with an Amendment.

May 26, 1910.

Ordered to be reprinted with new amendment in lieu of amendment previously reported.

(Strike out all after the enacting clause and insert the part printed in italics.)

AN ACT

To authorize the President of the United States to make withdrawals of public lands in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the President be, and he hereby is, authorized to withdraw from location, settlement, filing, and entry areas of public lands in the United States, including the District of Alaska, for public uses or for examination and classification

~~7 to determine their character and value; and the Presi-~~
~~8 dent is~~
~~8 further authorized, when in his judgment public interest~~
~~9 requires it, to withdraw from location, settlement, filing,~~
~~and~~
~~10 entry areas of public lands in the United States, includ-~~
~~ing the~~

2

~~1 District of Alaska, whether classified or not, and sub-~~
~~mit to~~
~~2 Congress recommendations as to legislation respecting~~
~~the~~
~~3 land so withdrawn.~~
~~4 SEC. 2. That the Secretary of the Interior shall report~~
~~5 all withdrawals made under the provisions of this Act to~~
~~6 Congress at the beginning of its next regular session~~
~~after~~
~~7 date of the withdrawals, specifying the purposes of each~~
~~8 thereof. All withdrawals heretofore made and now~~
~~existing~~
~~9 are hereby ratified and confirmed as if originally made~~
~~under~~
~~10 this Act. All withdrawals shall remain in force until re-~~
~~11 voked by the President or by Congress.~~

12 That the President may, at any time in his discretion, tem-
13 porarily withdraw from settlement, location, sale, or entry
14 any of the public lands of the United States and the Territory
15 of Alaska and reserve the same for water-power sites, irriga-
16 tion, classification of lands, or other public purposes to be
17 specified in the orders of withdrawals, and such withdrawals
18 or reservations shall remain in force until revoked by him or

by an Act of Congress.

SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: *Provided,* That the rights of any person who, at the date of any order of withdrawal

3

heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: *And provided further,* That this Act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to the passage of this Act: *And provided further,* That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the

date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: *And provided further,* That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

4

SEC. 3. That the Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals.

Passed the House of Representatives April 20, 1910.

Attest:

A. McDOWELL, *Clerk.*

In the Supreme Court of the United States.

October Term, [illegible]

No. 278

THE UNITED STATES OF AMERICA, Appellant,

vs.

THE MIDWEST OIL COMPANY, et al.,

Appellees.

On Appeal Certified to the Supreme Court from the United States Circuit Court of Appeals for the Eighth Circuit on Appeal from the District Court of the United States for the District of Wyoming.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLEES.

JOHN F. [illegible],

HENRY McALLISTER, JR.,

KARL C. SCHUYLER,

Solicitors for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 750.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

THE MIDWEST OIL COMPANY, ET AL., APPELLEES.

On Record Certified to the Supreme Court from the United States Circuit Court of Appeals for the Eighth Circuit on Appeal from the District Court of the United States for the District of Wyoming.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLEES.

In view of the fact that by order of the court this case has been redocketed and set down for reargument, we have thought it appropriate to submit, in printed form, some additional suggestions. We have, therefore, prepared this supplemental brief. We have tried to avoid repetition of matters stated in our original brief, except to such slight extent as was necessary to enforce the new points made.

I.

The Well-Established Public Policy of the United States Is Opposed to Appellant's Contention.

The *public policy* of the United States in relation to control over the public lands, and especially as to public *mineral* lands, is opposed to the validity of the executive withdrawal of September 27, 1909.

The public policy here referred to is manifested by a succession of recent statutes. In the first appendix to our original brief (p. 169) we called attention to the fact of discretionary power being given by Congress to the Secretary of the Interior in reference to the survey and location of reservoir sites. Congressional action specifically provided that the lands selected for sites for reservoirs "and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law." (25 Stat. L., 527.)

A limitation upon the broad authority so given was soon after established by congressional action. By act approved March 3, 1891, it was provided that the reservoir sites to be selected and located under the law above mentioned "shall be restricted to and shall contain only so much land as is *actually necessary** for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the selection of said reservoirs." 26 Stat. L., p. 1101.

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* In all quotations in this brief italics are ours.

By the same act, however, last above cited, the President was given very large authority for the establishment of forest reserves. This statute is also cited in the appendix to our former brief (p. 169), and the clause referred to reads as follows:

> "Sec. 24. That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof."
>
> 26 Stat. L., 1103.

Here was *statutory* authority permitting the President, at his own discretion, to make the selection of such reserves, and define their limits, and without any restriction as to the character of the land, whether mineral or non-mineral, that should be included in such reservation.

This statute is the high-water mark of authority given by Congress for large reservations of the public lands. But limitations upon the power so given were soon after expressed. By act approved June 4, 1897, it was provided as follows:

> "And any *mineral lands* in any forest reservation which have been or may be shown to be such, and subject to entry under the existing *mining laws* of the United States, and the rules and regulations applying there-

to, shall continue to be subject to such location and entry, notwithstanding any provision herein contained."

In the same act it was provided as follows:

> "Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of *prospecting, locating* and developing the *mineral* resources thereof: Provided that such persons comply with the rules and regulations covering such forest reservations."
>
> 30 Stat. L., p. 36.

It will be observed that this provision of law was made by the Fifty-fifth Congress, at its first session, and the Fifty-fourth Congress had, only four months before, passed the law cited in our original brief, to-wit, the act of February 11, 1897 (29 Stat. L., 526), which provided "that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to land containing *petroleum* or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

Five years after the act of February 11, 1897, was passed, Congress by statute showed its continued adherence to the *method* therein prescribed for obtaining title to oil lands, for in the act relating to the Philippine Islands, which included provisions for the acquisition of titles to lands, it was provided as follows:

"That any person authorized to enter lands under this act may enter and obtain patent to lands containing *petroleum* or other mineral oils, and chiefly valuable therefor, under the provisions of this act relative to *placer mineral* claims."

32 Stat. L., 702, sec. 42.

Under the broad authority given by the forest reserve statutes, temporary withdrawals of lands, with the view of the creation of permanent forest reserves under the authority of the statute, had been made by the executive department, and these *temporary* withdrawal orders at first contained no excepting clause in respect of mineral lands, which was the occasion of correspondence between the Commissioner of the General Land Office and the Secretary of the Interior; and on November 21, 1903, Secretary Hitchcock advised the Commissioner of the General Land Office as follows:

"The act of June 4, 1897 (30 Stat., 36), explicitly provides that nothing therein shall prohibit 'any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, *locating and developing the mineral resources* thereof,' and provides that any *mineral* lands in any forest reservation shall be subject to *location and entry* under the *mineral laws*. In view of this provision as to the effect of the creation of a forest reserve upon mineral lands included therein, there would seem to be no good purpose served in withdrawing

such lands under a temporary order for the purpose of determining whether a permanent reservation shall be established."

32 L. D., 307, 308.

The wide discretion which had been vested in the President by congressional authority as to the making of forest reservations was further limited by the act of March 4, 1907, which contained this provision:

"Provided, further, that hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado or Wyoming, *except by act of Congress.*"

34 Stat. L., 1271.

This same provision was repeated, *ipsissimis verbis*, in the act of June 25, 1910 (36 Stat. L., 848), which last-mentioned statute is fully discussed in our original brief (pp. 131-139).

It is interesting to observe that on December 6, 1910, the President in a message to Congress urged a modification of this very limitation. In that message, after referring to his conservation address at St. Paul in September, 1910, he says:

"For the reasons stated in the conservation address, I recommend:

First: That the limitation now imposed upon the executive, which forbids his reserving more forest lands in Oregon, Washington,

Idaho, Montana, Colorado and Wyoming, be repealed."

Message of December 6, 1910, p. 55.

Now, what did Congress do, in view of this recommendation of the President? It took no immediate action, but by the amendment to the act of June 25, 1910, hereinafter mentioned—to-wit, by the act of August 24, 1912—instead of complying with this recommendation of the President, it widened the prohibition against increase of forest reserves by including in such prohibition the State of California in addition to those previously mentioned, it being provided in that statute as follows:

> "That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of *California*, Oregon, Washington, Idaho, Montana, Colorado or Wyoming, *except by act of Congress.*"
>
> 37 Stat. L., 497.

This statutory provision shows a purpose by legislative action, not to enlarge, but to restrict, the powers of the President as to withdrawal of public lands, or the making of large reservations of public lands for purposes theretofore authorized; and this action is taken in opposition to direct recommendations of the President.

As further illustrating the policy of the government in the maintenance of rights given to citizens to locate mineral lands under the mining laws, we call attention to a situation developed by the record in

this case and by statutes, as follows: Petroleum Withdrawal No. 5, of September 27, 1909, purported to withdraw all the lands mentioned in the lists accompanying the withdrawal order (which, as shown in our original brief, included all the known public petroleum lands of the United States) "*from all forms* of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws" (Rec., p. 8). The order in its scope would prevent the location or acquisition of *metalliferous* public lands, as well as those containing oil; and yet when, in accordance with the earnest recommendations of the executive, Congress passed a law giving power of withdrawal, it specially provided:

> "That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to minerals other than coal, oil, gas and phosphates."
>
> Act of June 25, 1910, 36 Stat. L., 847.

Congress thereby expresses its *disapprobation* of the wide scope of the withdrawal order of September 27, 1909, and, while yielding to the President's recommendations in reference to certain minerals, still maintains the right of citizens to utilize the mining laws for the acquisition of public mineral lands, except as to the kind of minerals mentioned—coal, oil, gas, and phosphates—thereby carefully limiting the extent to which, even under legislative authority, the

privileges given by the mining laws may be suspended by the Executive.

Some time after the passage of the act of June 25, 1910, the President came to the conclusion that the exceptions as to entries of mineral lands fixed by that act should be widened so as to cover potash and nitrates, and in his message of March 26, 1912, he recommends an amendment of the statute. The result was the act of August 24, 1912, which amended section 2 of the act of June 25, 1910, so that the first part thereof should read as follows:

> "That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation and purchase under the mining laws of the United States so far as the same apply to *metalliferous minerals*."
>
> 37 Stat. L., 497.

We here find again manifested the purpose of Congress, while yielding to the recommendations of the President as to specific minerals, still to hold the mining laws intact, except as, by *its own statutory provision*, it excepts *certain* minerals from the operation of those mining laws, within areas covered by the authorized withdrawals.

The soundness of appellant's contention may be, in a measure, tested by assuming that the location made by the grantors of appellees on March 27, 1910, was a location of a lode-mining claim in which there had been a discovery of gold; that this discovery was such as to show the property more valuable for the gold contained in it than for any other purpose; that

the necessary excavations were made, the claim marked as required by law, and location certificate filed, and that all the proceedings required by the mining laws of 1872 were fully complied with prior to the passage of the act of June 25, 1910. The case would then be exactly like the present case, except that it would relate to metalliferous ores instead of to oil.

Now, would this withdrawal order be valid as against the claim of the locator of such lode-mining claim? The appellant could make exactly the same argument that it now makes in reference to the implied or inherent power of the President to make withdrawals of lands, and as to the contemplated naval uses of the lands so withdrawn. But the mining laws of 1872 were in full force and effect, and when we come to the act of June 25, 1910, we find that Congress leaves these laws intact, of course as to lands not withdrawn, and even as to those lands which, *under the authority of the statute*, may thereafter be withdrawn. The right to explore such "withdrawn" lands for metalliferous ores, and to locate and acquire title to the lands containing such ores, is by express enactment still retained. The locator's right, denied by the *order*, had been created and was protected by laws enacted *prior* to the order, and was protected, even as to lands validly withdrawn, by statute enacted after this *order* was made. Would not the necessary inference be that the order of withdrawal of September 27, 1909, was void as to such lode-mining claims so based on the discovery of metalliferous ores? All legislative precedent, all precedent of any kind, would say that the rights of the locators under existing laws remained unaffected notwithstanding the withdrawal order. Now, how does the present case differ from the

one supposed? It relates to the discovery of oil instead of the discovery of gold, and that is the only respect in which it differs from the case assumed. But this difference, instead of weakening our contention, strengthens it, in view of the fact that twenty-five years after the mining laws had been passed—to-wit, in February, 1897—a particular statute had been enacted which provided that *oil* lands might be entered under the placer-mining act; and the act of June 25, 1910, did not attempt to change the provisions of that statute, and especially provided that such act of June 25, 1910, should *not* be construed as *abridging* any rights claimed to have been acquired after the withdrawal of September 27, 1909, and before the enactment of the statute itself. If the conclusion is logical that in the assumed case of a gold-mining claim the withdrawal order was invalid, then, *a fortiori*, is it invalid as to *oil* claims located and perfected pursuant to the definite authority of Congress given by the act of February 11, 1897.

Moreover, the argument of appellant leads to another strange conclusion. The order of September 27, 1909, as already stated, purported to withdraw the lands mentioned from *all* forms of entry by private citizens, and thereby to prohibit the acquisition of metalliferous lands. The act of June 25, 1910, provided that all lands "withdrawn *under the provisions of this act*" should be open to acquisition as to metalliferous minerals. This act was not an act confirmatory of previous withdrawals, as we have abundantly shown. Our contention is that it granted to the Executive a power he did not previously possess. But under appellant's argument, instead of extending executive power, this statute *restricted* a power al-

ready possessed. Under such a contention the locator of a lode-mining claim, who initiated and perfected his claim after September 27, 1909, and *before* the withdrawal of July 2, 1910 (based on the act of June 25, 1910), would lose his claim, while an adjoining locator who initiated his claim after the withdrawal of July 2, 1910, would hold his claim by valid title.

In our original brief we contended that there had never been a practice or continued usage on the part of executive officers of *withdrawing* public *mineral lands* from location or entry under existing laws. (Brief, p. 129.) And this was in answer to the contention made by the appellant that there had been many illustrations of the withdrawal of lands for various purposes, and especially of *appropriations* of lands for military uses and for Indian reservations.

In the appellant's supplemental brief (p. 18) it is contended that a long-existing executive practice is not necessary to sustain appellant's argument. Counsel say: "Antiquity is not the only touchstone." And then, again, further say that "an agent's implied authority widens as his acts extend with the knowledge of his principal."

This is an insidious argument for the encroachment of executive power upon the legislative power. Knowledge of the principal is assumed from the fact that reports are made by the Land Department, and the mere *silence* of Congress is contended to be, under such circumstances, an authorization of the agent's acts so reported, even though they be in violation of existing law. We have in our original brief discussed this subject. It seems to us an untenable doctrine. It means that gradual encroachments may be made by the Executive upon the powers which the Constitution

vests in Congress alone, and it construes the fact that Congress does not in terms by affirmative action repudiate the executive act, as having the effect of changing the *constitutional* distribution of powers; and the contention is that a few *recent* executive acts (not amounting to long-recognized usage) are evidence of authorization by Congress, because Congress has not in terms *objected*.

One insurmountable objection to this argument of counsel for the government is that when Congress enacts a statute — a "perpetual" statute (*United States vs. Gear*, 3 How., 120, 131) — such statute speaks not only as of the day of its approval, but for *every* day it stands unrepealed. It is "new every morning." On September 27, 1909, the act of February 11, 1897, was as effective as if it had been enacted on the preceding day. So, also, was the act of May 10, 1872. Such laws were as binding upon the Executive as on the meanest citizen. (Cases cited in our former brief, p. 122.) If there had been previous violations of these statutes, and however frequent such violations had been, that would not nullify the law. If the order of September 27, 1909, was itself in violation of the laws we have cited, then it cannot be validated by reason of previous like violations. The validity of the order must be tested by the statutes then in force.

In our original brief we contended not only that there was no customary usage or long-continued practice of withdrawing public *mineral* lands from location or entry under existing laws, but that there were no precedents prior to the order of September 27, 1909, for such withdrawal. And that order is the very order the validity of which is now in controversy.

Counsel do not cite any case of the *withdrawal* of lands from *mineral entry*, and, as applied to the subject now under consideration, the "agent's implied authority" has not been widened "with the knowledge of his principal."

Moreover, the argument for an implied authority of the character now contended for by the government counsel, growing out of unchallenged acts of the Executive, is completely overruled by legislative enactments of the character we have hereinabove set forth, which show a determined and continuous legislative policy which is inconsistent with the implied executive power for which appellant contends. The argument is further vitiated as to the specific case now on hearing by the fact that the President specially requested, and the original bill (H. R. 24070) provided, that this order of September 27, 1909, should be ratified and confirmed; but *Congress* expressly *refused* such ratification or confirmation, struck out of the bill the provision to that effect, and provided that rights claimed, arising *after* the order of withdrawal was made, should not be deemed "abridged" by anything contained in the act which Congress then passed.

Since the former argument in this cause, there has been issued from the press the third edition of Lindley on Mines. Mr. Curtis H. Lindley, the author of that work, is a law writer of great experience and high repute, and the earlier editions of his work have been frequently cited as authority and relied on in decisions of this court.

In the new edition of his valuable treatise Mr. Lindley discusses the subject which we are now considering. He says:

"In determining what is 'public policy,' we are not at liberty to look at general considerations of the supposed public interests and policy of the nation upon this subject beyond what its constitution, laws and judicial decisions make known to us. Remote inferences, or possible results or speculative tendencies, are not to be indulged in for such purposes.

'Public policy' is not to be determined by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public. It will also be readily conceded that any executive withdrawal which is avowedly for a purpose which contravenes a recognized existing public policy readily deducible from the constitution, laws and judicial decisions cannot be upheld."

1 Lindley on Mines (3d ed.), p. 437.

The Court of Appeals of the Eighth Circuit, speaking through Judge Sanborn, says:

"The public policy of a state or nation must be determined by its constitution, laws and judicial decisions; not by the varying opinions of laymen, lawyers or judges as to the demands of the interests of the public." (Citing cases.)

Hartford F. Ins. Co. vs. Chicago, M. & St. P. Ry. Co., 70 Fed., 201, 202.

The author of the treatise above mentioned considers the withdrawal order of September 27, 1909, as

invalid, and he assigns the following reasons for his conclusion:

> "First: The order was made confessedly in aid of proposed legislation and therefore not in pursuance of any duty, express or implied, enjoined upon the executive under any existing law.
>
> Second: It was not made for any definite recognized public governmental purpose, to satisfy any governmental necessity or to aid in the performance of any public governmental function.
>
> Third: It was not made in the furtherance of any recognized or defined public policy, but in an attempt to advocate a change in that policy.
>
> A small group of men in official life, considering that our public land laws as they exist in the statute books were unwise, unsuited to our industrial and economic conditions and should therefore be modified or repealed, may properly recommend to the lawmaking body modifications in or change of the system. But this does not establish a public policy, nor authorize the executive to withdraw any part of the public domain from mineral location to await the action of congress on their proposals. Such withdrawal is practically the nullification or absolute suspension of the operation of laws over withdrawn areas, to abide an event which may never happen. Existing 'public policy' is found in the statutes of the United States

opening the public domain to location under the mineral land laws, and not in the conception of government officials that the laws and the policy should be changed. Under acts of congress dealing with national forests, the executive is prohibited from closing the areas, temporary or permanent, from the prospector and the miner. Does this not establish a public policy, and is not the withdrawal under consideration an attempt to sequester a part of the public domain in order to give congress the opportunity of changing the policy? * * * We are not concerned with the wisdom or unwisdom of the proposed changes in law and policy. Our inquiry is limited to the sole question of power of the executive to exercise a function which under the constitution is confided to congress. We do not think the executive has that power."

1 Lindley on Mines (3d ed.), pp. 439-440.

II.

No Lands in Wyoming Were Reserved for Naval Uses.

In our original brief and argument we contended that the lands in controversy, being a part of the 170,000 acres in Wyoming covered by the withdrawal order of September 27, 1909, were not withdrawn for naval uses, and, indeed, that no lands in Wyoming were withdrawn for naval uses. Since making that

contention at the former hearing in this court, we note that the Interior Department of the government of the United States fully agrees with us. The present Secretary of the Interior in his last annual report (1913), at page 15 thereof, specifically states:

> "The *one sole* reservation of oil lands for governmental use is that in *California*, over the withdrawal of which litigation is now pending."

This "sole reservation of oil lands for governmental use" consists of 68,249 acres mentioned by the Director of the Geological Survey, in Bulletin No. 537, and discussed in our former brief at pages 22 and 23. We contended in our brief that the dominant purpose of the withdrawal of vast areas of land, aggregating 4,654,000 acres, was not for naval uses—that such use was but an incident and confined to California—but was to prevent the acquisition of these lands under the existing mining laws, in the hope and expectation that Congress would change the mode of their acquisition. Now, in opposition to the contention made by the appellant in this case, that the entire withdrawal of several million acres was for naval uses, we have this express declaration of the Secretary of the Interior himself to the effect that the only reservation for governmental use is the one in *California*.

III.

The Authority of the President to Make the Withdrawal of September 27, 1909, Cannot Be Implied from His Statutory Duties Concerning the Navy.

In the supplemental brief of the appellant it is argued, commencing at page 11, that this implied power in the President may be derived from his statutory duties concerning the navy. As a basis for the argument, appellant quotes section 417 of the Revised Statutes, which provides:

> "The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the *procurement of naval stores and materials*, and the construction, armament, equipment and employment of vessels of war, as well as all other matters connected with the naval establishment."

And section 1552 of the Revised Statutes is also cited. It reads in the following words:

> "The Secretary of the Navy may establish, at such places as he may deem necessary, suitable *depots* of coal, and other fuel, for the supply of steamships of war."

Is it not rather a far-fetched argument to deduce from these statutory provisions an authority in the Secretary of *Interior*, even though with the approval of the President, to withdraw from public entry under existing laws all the mineral oil domain of the United

States, especially in view of the constitutional provision, much higher than any statute, which vests in *Congress* the exclusive power to dispose of, and make all needful rules and regulations respecting, property belonging to the United States? (See our former brief, pp. 37-40.)

The provisions of section 417 of the Revised Statutes, like those of section 441, relate only to the administrative duties of the head of the department, and give him no power that is inconsistent with existing law. In fact, it is especially provided by section 161 of the Revised Statutes as follows:

> "The head of each Department is authorized to prescribe regulations, *not inconsistent with law*, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

In the face of statutes which give definite rights to citizens in reference to public mineral lands, it is hard to see the validity of the argument that is here presented by appellant.

Counsel also, in further support of this argument, cite a provision of the appropriation act of March 3, 1909, which they say expressly authorizes the procurement of coal and *other fuel*. (35 Stat. L., Ch. 255, p. 761.) The language of the provision referred to is as follows:

> "*Coal and Transportation: Purchase* of coal and other fuel for steamers' and ships'

> use, and other equipment purposes, including expenses of transportation, storage, and handling the same, and for the general maintenance of naval coaling depots and coaling plants, five million dollars."

We contended on the former hearing that, before it would be possible for the withdrawn lands to be utilized for naval purposes, an entire change of legislative policy would be necessary. We urged that the government had always been in the habit of *buying* its fuel supplies upon the market, and not producing them from its public lands by its own agency, and that, in order that the so-called public use might justify the withdrawal of mineral oil lands from the operation of existing laws, it would require a *legislative change* in a long-continued government policy. (Former brief, p. 16.)

We have in the very statute cited by counsel an illustration that points our argument. The appropriation act referred to wholly pertained to the "purchase" of coal and other fuel. That has always been the customary method by which the government would secure its supplies, and the private entry of oil lands under existing laws would not stand in the way of the exercise of this power and right by the government. As stated at pages 155 and 156 of our former brief:

> "If, by private effort, oil is produced from such located lands, it becomes a part of the common supply for the industries and commerce of the country, and represents no actual loss to the people."

Instead of limiting, it increases the opportunities of the government to do exactly what this appropriation bill provided for, and that is to purchase fuel for steamers' and ships' use.

Consideration of this argument of the government suggests also an inconsistency in the reasons urged by the Director of the Geological Survey for the withdrawal of petroleum lands from the operation of existing laws. On February 24, 1908, in a letter to the Secretary of the Interior, Mr. George Otis Smith, the Director of the Geological Survey, uses this language:

> "Regarding the petroleum supply, the production last year *did not meet the requirements of the trade*, and the reserve stock was drawn on to meet the demand. At present the rate of *increase in demand* is more rapid than the increase in production, and this, taken in connection with the great falling off in certain of the older fields, due to depletion of the sands and to flooding by water of sands which otherwise might be productive, shows how important is this matter of a conservation of the remaining supply." (Appellant's brief, p. 109.)

Yet in the very next year, in a letter to the Secretary of the Interior under date of September 17, 1909, Mr. George Otis Smith, the Director of the Geological Survey, uses this language, after speaking of the "survey's conservation report on the petroleum resources of the United States":

> "In this report it is shown that the present *production* of petroleum *exceeds* the legitimate demands of the trade and that inasmuch as the disposal of the public petroleum lands at nominal prices simply encourages overproduction the logical method of checking this unnecessary waste would be to secure the enactment of legislation that would provide for the sane development of this important resource. In view of the well-known facts of the mode of occurrence of oil and the all too common practice of drilling wells close to boundary lines of private holdings that are being developed for oil, conservation of the petroleum supply demands a law that will provide for disposal of the oil remaining in the public domain in terms of barrels of oil rather than of acres of land." (Appellant's brief, pp. 110-111.)

These arguments not only oppose each other, but it will be observed that in both cases it is the "demands of the *trade*" that are made the special basis of the recommendations; and that the prime object of the recommendation is to induce a change of the law as to the *method of disposition* of petroleum deposits, and that the requirements of the navy constitute but an incident in the argument, as urged by us in our former brief (pp. 9-23).

IV.

The Argument of Appellees Does Not Depend upon Any "Dedication" of the Mineral Lands to Private Acquisition

Counsel for the government, at several places in their original and supplemental briefs, contend that our argument attributes to the mining law a purpose to *dedicate* all the public mineral lands in the United States to private acquisition. In their supplemental brief they say that we "treat it as though it evidenced an intention of Congress that every foot of such land should be devoted to this purpose and none other." They say that our idea "seems to be that every parcel has been acted upon by the legislative will and appropriated as effectively as though it had been specifically described and set apart by statute." (Appellant's supplemental brief, p. 2.)

This is very remote from our contention. But we do contend that Congress does by statute extend rights to the citizens in reference to mining lands. Counsel for the government call them "offers" and say: "These offers are *continuing* general offers." (Appellant's brief, p. 18.) The fact that they are continuing general offers, effective every day, is sufficient for our purpose, for they thereby give a right to the private citizen; and while the power that gave the right—to-wit, Congress itself—can at any time revoke the offer so made prior to the accrual of *vested* rights, yet, until so revoked by the power that made it, the offer stands good and may be availed of by the citizen.

Counsel say (brief, p. 19) that Congress has made the Executive "the guardian of the people of the United States over the public lands," citing *Knight vs.*

Land Association, 142 U. S., 161, 181. It would be well to complete the quotation. It is as follows:

> "The *Secretary* is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the *law is carried out*, and that none of the public domain is wasted or is disposed of to a party *not entitled to it*."

We can afford to stand upon this statement of the law, for our rights rest upon unrepealed statutes, and under those statutes our grantors were entitled to the land they located.

But under what circumstances does this court make the statement we have above quoted? It is made in reference to the Secretary's supervisory control over *surveys* of public lands; and Justice Lamar, in announcing the decision of the court in that case, said:

> "It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding."
>
> Knight vs. Land Association, 142 U. S., 161, 176.

Counsel again, in this connection, quote from *Wilcox vs. Jackson* (13 Peters, 496, 514), as follows:

> "We cannot suppose that this bounty was designed to be extended, at the sacrifice of *public establishments, or great public interests*."

But we have already shown in our former brief that this court was very particular to show, in the case of *Wilcox vs. Jackson*, that the previous *appropriations* of lands for public uses involved in that case had been authorized by *statutes*—statutes which had been enacted before the appropriation was made; and at the time the claim of the settler arose in that case there was in existence a "public establishment" upon the very land in controversy, and public interests were involved in the possession, then had by the government, of that particular land. Indeed, if counsel had included in their quotation the very next succeeding sentence, they would have found that it reads as follows: "When the act of 1830 was passed, Congress must have known of the authority which had, *by former laws*, been given to the President, to establish trading houses and military posts." The lands there involved came within the rule much later announced by Justice Brewer in *Scott vs. Carew* (196 U. S., 100, 109); they were lands which for some *special public purpose* had been, in *accordance with law*, taken full *possession* of and were in the *actual occupation* of the government.

The "continuing general offers" made to the private citizen by the mining statutes apply to all public mineral lands, "unless some particular lands have been withdrawn from sale by *congressional authority*, or by an executive withdrawal *under such authority*, either expressed or implied."

Lockhart vs. Johnson, 181 U. S., 516, 520.

In various cases cited by us in our former brief the original withdrawal, afterwards held invalid by this court, had been made by the Secretary of the In-

terior, and his act is deemed the act of the President. But in those cases, under the "continuing general offers" made by the homestead and pre-emption acts, the rights of settlers originating subsequent to the withdrawal order were held to be good. The previous withdrawal orders did not affect their validity.

Hewitt vs. Schultz, 180 U. S., 139.

Southern Pacific Ry. Co. vs. Bell, 183 U. S., 675.

Nelson vs. Northern Pacific Railway, 188 U. S., 108. (See our former brief, pp. 56, 84.)

Sjoli vs. Dreschel, 199 U. S., 564.

Brandon vs. Ard, 211 U. S., 11.

Osborn vs. Froyseth, 216 U. S., 571.

Certainly, if under the pre-emption and homestead laws a settler's claim is valid against a previous executive withdrawal not authorized by statute, then by stronger reason, in view of the policy of the government as heretofore discussed, a right properly initiated and perfected by a qualified person under the mining laws will be protected against an executive withdrawal not authorized by any precedent statute.

V.

The Possible Scope of Executive Power in the Matter of Withdrawals of Public Lands.

We have already made reference to the new edition of Lindley on Mines. That author, while holding, as we have heretofore shown, that the order of with-

drawal of September 27, 1909, was invalid, yet recognizes certain contentions such as are made by the appellant in this cause. He distinguishes them, however, from the question which is now before this court. Mr. Lindley says:

> "The right of the executive to place any part of the public domain in a state of temporary reservation for a *definite public use* in the furtherance of any purpose *recognized by existing law* or sanctioned either by *governmental necessity* or by a *well-established public policy* may not be seriously questioned. For example, the courts have held that the executive might without special legislative authority withdraw lands for a lighthouse [*Wilcox v. Jackson*]; for military purposes [*Grisar v. McDowell*]; for aiding in the improvement of a navigable river [*Wolcott v. Des Moines Co.*]; or to abide the adjustment of disputes between conflicting claimants to the public lands [*Wolsey v. Chapman*]. It may also be considered as well settled that where congress invests the executive with power to create permanent reservations of any class, the power to temporarily place areas in a state of reservation with a view to ultimate permanency may be implied as being in aid of an unquestioned public purpose. But we think it will be readily recognized that the power of withdrawal is not an arbitrary one [*Sjoli v. Dreschel*]; that in its exercise the executive cannot impinge upon the powers of congress

> to regulate and control the disposition of the public lands or establish a definite policy regarding such disposition in advance of some declaration by the legislative branch of the government."
>
> 1 Lindley on Mines (3d ed.), sec. 200b, p. 436.

In our former brief we discussed each one of the cases cited by Mr. Lindley. We showed that in *Wilcox vs. Jackson* there was previous statutory authority. *Grisar vs. McDowell* involved a small parcel of land—the "Presidio"—actually occupied by the government for military purposes at the time plaintiff's rights accrued. In *Wolcott vs. Des Moines Company* the Secretary had "not only the power but the duty" to reserve the lands embraced within the grant, and it devolved upon him to construe the grant and determine its scope. In *Wolsey vs. Chapman*, referring to the same grant, it was "*conceded* that the lands in controversy were actually reserved from sale by *competent authority* when the selection was made." (101 U. S., 768.)

We also contended, however, in our former brief, that even if it be true that the President has power, not founded on statute, to appropriate and take possession of particular tracts of land for specific public purposes, this was no argument in support of a power to withdraw from the operation of existing laws the entire mineral oil domain by an order which makes no appropriation for any purpose, takes no possession of any land, and devotes no land to a public use. (Former brief, pp. 73 *et seq.*) Even if it be true that the President may withdraw a particular tract of land by

reason of some doubt in his mind as to the effect of some statutory provision (e. g., the scope of a grant), pending congressional action which would resolve the doubt, yet, where there is no doubt as to the meaning of a statute, a general withdrawal of lands with a view to obtaining a change in the laws by "proposed legislation," in order to carry out the executive idea as to a *future* public policy, cannot be sustained by any like principle. There is no ambiguity in the act of May 10, 1872, or in the act of February 11, 1897; it is not claimed that there is any question of doubt as to the meaning of these statutes, and the announced purpose of the withdrawal order of September 27, 1909, related only to "proposed legislation" concerning the use and disposition of petroleum lands.

Moreover, the public purpose which will support a withdrawal of public lands from the operation of existing laws must, in any event, be a declared and accepted public purpose, not merely declared by the person who then happens to hold the executive office, but be so declared by legislative action; for public purposes of the character we are here discussing can only be such as are recognized by the laws of the land. The act of June 25, 1910, permits withdrawals to be thereafter made for certain designated purposes, and for "other public purposes," but requires that the purpose, whatever it is, shall be "specified in the orders of withdrawal."

We respectfully submit that "proposed legislation," the proposal coming only from the executive department, is not a "public purpose" within the meaning of those words as used in any statute, or as in any way recognized by Congress. Congress, hav-

ing the exclusive power to dispose of, and make all needful rules and regulations respecting, the property, including the public lands, of the United States, is, clearly, the only authority which can designate any public purpose for which such lands may be withheld from the operation of laws which Congress has enacted.

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